No. 11,632

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. COBURN COOK, as Trustee,
Appellant,

vs.

BAXTER CREEK IRRIGATION DISTRICT and the Landowners, H. J. CLARK, LURLEY CLARK, LENORA M. BAILEY, LYAL ZEITLER, GEORGE MCROREY, RACHEL MCROREY, MR. AND MRS. G. A. BLICKENSTAFF and JAMES M. FARRELL and AMY L. FARRELL,
Appellees.

BRIEF FOR APPELLEES LENORA M. BAILEY, LYAL ZEITLER, GEORGE McROREY, RACHEL McROREY, MR. AND MRS. G. A. BLICKENSTAFF AND JAMES M. FARRELL AND AMY L. FARRELL.

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STATEMENT OF FACTS.

This is an appeal by W. Coburn Cook from an order of the District Court in a composition proceeding under the Municipal Bankruptcy Act. The appeal is from that part of the order denying appellant's

request for instructions authorizing him to institute suit to determine whether certain lands were subject to the debtor's plan of composition. (R. 99.) The individual appellees named herein are the present owners of this land. They and the Baxter Creek Irrigation District appeared before the District Court in opposition to appellant's application. (R. 94.)

The composition proceedings originated in an agreement executed August 28, 1945 by the Baxter Creek Irrigation District with Mr. Cook as the representative of the holders of 79% of the outstanding bonds of the District. (R. 62-83.) This agreement provided that it should be submitted by the District to the United States District Court as a plan of composition in accordance with Sections 81-84 of the Bankruptcy Act. (R. 65.)

The Plan proposed that the owners of land within the District could satisfy the delinquent and unpaid assessments against their land by payment of the amounts set forth in the schedule attached to the Plan. (R. 65.) These amounts were much less than the existing assessments against the land and the District proposed that this payment would relieve the landowner of any further liability for assessment to satisfy the outstanding indebtedness. The amounts so paid were referred to as redemption values. All money received under the provisions of the Plan was to be deposited with the First National Bank in Turlock for distribution directly to the non-consenting creditors and to Mr. Cook as agent for the consenting creditors. (R. 74-77.)

Those lands which were not discharged from liability for the outstanding bonds by payment of the redemption price, the District agreed, would be sold to the District for the delinquent levies immediately upon expiration of the redemption period. The Plan further provided that all property received by the District, whether under the Plan or otherwise acquired, would be conveyed to Mr. Cook as trustee for both the consenting and non-consenting creditors. (R. 72-74.)

The Plan was accepted by 80% of the creditors prior to filing (R. 5) and on September 17, 1945, the Plan with consents attached, and the District's Petition for Confirmation of Composition were filed with the District Court. (R. 2.) The Court's order approving the filing of the petition was filed the same day. (R. 30.) The hearing on the petition was held December 7, 1945. On January 3, 1946, the court entered its findings of fact, conclusions of law, and interlocutory decree approving the Plan. (R. 28-61.)

Schedule B attached to the Plan and incorporated therein by reference consisted of 11 pages and set forth a description of lands with the redemption values for each tract. The last part of Schedule B appearing on pages 10 and 11 is entitled "Supplement to Baxter Creek Irrigation District (Cont'd)" and provides:

> "If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'."

Listed below this provision are the names of the owners and the descriptions of lands and redemption values for the properties which are the subject of Mr. Cook's application for instructions. (R. 84-88.)

In *Pueblo Trading Co. v. Baxter Creek Irrigation District,* No. 4195 L (reported in 61 Fed. Supp. 586), Mr. Cook, as attorney for the plaintiff, sought to compel the levy of an assessment by the District against the very lands involved here. The District was the named party defendant in that action but the landowners, pursuant to order of the District Court, intervened in the proceeding and opposed Mr. Cook's application. The District Court in that action ruled that the lands were not within the boundaries of the District and not subject to assessment by the District (6 Fed. Supp. 586). (R. 94.) By the application for instructions filed below, Mr. Cook sought authority from the Bankruptcy Court to relitigate this issue which was decided adversely to him in the *Pueblo* case. Mr. Cook's appeal is from that part of the Court's order filed March 17, 1947, denying his application for this authority. His application also sought authority to determine the liability of lands of the United States to assessment under the Plan. This authority was granted by the lower Court upon the condition that appellant institute such actions or proceedings within 30 days from notice of the Court's order. (R. 97.) Appellant's notice of appeal was filed April 21, 1947. (R. 99.) Appellant took no action as to the Government lands within the time prescribed

by the Court's order and all questions concerning it became moot prior to the expiration of the time for the filing of a cross-appeal.

I.

APPELLANT HAS NO AUTHORITY TO RAISE THE QUESTION PRESENTED BY THE APPLICATION FOR INSTRUCTIONS.

The application for instructions was filed in the Bankruptcy Court and the appeal taken herein by Mr. Cook as "Trustee for the Creditors of the Baxter Creek Irrigation District." The role of trustee has been assumed by Mr. Cook from the outset of his efforts to promote the plan of composition. The original contract with the District was entered into by Mr. Cook as agent for the Bondholders Protective Committee and certain other creditors who had deposited their bonds with him for purposes of collection. (R. 62.) At that time he was trustee for no one. The opening paragraph of the agreement, however, provides that it is between "W. Coburn Cook, hereinafter referred to as the Trustee, and the Baxter Creek Irrigation District, hereinafter referred to as the District." The agreement is signed by appellant, "W. Coburn Cook, Trustee." (R. 83.)

The significance of the use of this connotative term for purpose of identification soon appears. Paragraph I of the agreement provides that "said Trustee, as trustee for all bondholders, coupon holders, warrant holders and such judgment holders" will accept

payment from the landowners within the District in satisfaction of the liability of the land for payment of the indebtedness. (R. 65.) Paragraph II provides that all money in the District's Bond Fund and all property received by the District under the Plan or otherwise acquired shall be conveyed to Mr. Cook as Trustee for all of the creditors. (R. 69-74.)

The dual capacity of Mr. Cook, as trustee for all and as agent for some, appears in Paragraph III. It is there provided that the trustee shall deposit all money received by him under the Plan in the First National Bank of Turlock. The Bank is then directed to satisfy its expenses as depositary and Mr. Cook's claim for compensation as Trustee and "then divide the balance remaining between the Non-depositing Creditors and the said Trustee in accordance with their proportionate interest therein as hereinafter more definitely provided." (R. 74-77.)

This dual capacity is further illustrated by Paragraph XVI of the Court's findings of fact which provides:

"XVI.

> That W. Coburn Cook is an agent hired by the creditors he represents; that he has filed herein and offered in evidence his written contract of employment with said creditors and said contract, together with Paragraph III of said Plans, reveals the compensation that he is to receive for his work in effecting the plan of *compensa*tion (sic) with said District and acting as trustee under the plan filed herein in carrying out the provisions of the Plan and such compensation is

reasonable and fair and is the only compensation that he will receive for his efforts in this matter." (R. 35.)

The Petition for Confirmation of the Plan contains no prayer for the appointment of a trustee and the Court made no finding that the appointment of a trustee was necessary. Paragraph 27 of the Interlocutory Decree approving the Plan, however, provides:

"27. W. Coburn Cook named in the plan is designated and appointed Trustee for creditors herein and authorized to carry out the terms of the plan of composition, and he may apply to this Court for orders of assistance to that end or for instructions, upon notice to the petitioner. The compensation of said Trustee is fixed at fifteen per cent (15%) of the first Thirty Eight Thousand Eight Hundred and No/100 Dollars ($38,800.00) received by the Trustee or depositary on behalf of the creditors of the Baxter Creek Irrigation District, and fifty per cent (50%) of all amounts received in excess thereof whether in cash, property or otherwise, and he may at his option take his fee either in cash or property received." (R. 60.)

Paragraph 28 of the Decree further provides:

"28. The District is authorized to make the transfers and conveyances to W. Coburn Cook, Trustee, as provided by the plan and the trustee is authorized and directed to accept such conveyances and to administer the properties and to rent, hypothecate, sell or otherwise operate the same as trustee as in his direction may seem advisable

and for such purpose may designate an agent or agents." (R. 61.)

Paragraph 20 of the Interlocutory Decree also makes provision for an application for instructions. It provides:

> "20. * * * That the debtor Baxter Creek Irrigation District or the Trustee may from time to time apply to this Court for such other order or orders as may be necessary to carry out and make effective this Interlocutory Decree and this Court hereby reserves and shall have full and complete jurisdiction of said Plan of Composition." (R. 58.)

Appellant bases his right to institute suit against appellees on the provisions of Paragraphs 20 and 27 of the Interlocutory Decree. Appellant claims that his appointment as trustee under Paragraph 27 of the decree vested him with the right and duty of a regular trustee in bankruptcy to bring actions to preserve and protect the debtor's property.

This claim overlooks the fundamental distinction between ordinary bankruptcy proceedings and composition proceedings under Sections 81-84 of the Municipal Bankruptcy Act. This distinction was clearly expressed in an earlier case before this Court in which Mr. Cook appeared as counsel for the unsuccessful appellant, *Newhouse et al. v. Corcoran Irrigation District,* 114 Fed. (2d) 690. Judge Stephens there stated:

> "Throughout appellants' briefs the principle of ordinary or private bankruptcy that the assets of the bankrupt, including his property, must be

> effectively applied to the debts, is sought to be applied to the situation before us. The bankruptcy of a public entity, however, is very different from that of a private person or concern. The operative assets of an irrigation district and the value of the land of the District, of course, have their evidentiary value as to the amount of money the District can reasonably raise to meet its indebtedness. These elements of value are too affected by the incumbrances upon the land, which in this case appear to be very considerable. But such assets and such property within the District cannot be disposed of as in the ordinary bankruptcy proceeding for the benefit of the debtor. See *Clough v. Compton-Delevan Irrigation District,* 12 Cal. (2d) 385, 85 P. (2d) 126, 128."

This distinction was reiterated by this Court in the case of *Lorber v. Vista Irrigation District,* 127 Fed. (2d) 628, 637, where Mr. Cook again appeared on behalf of the appellants. In rejecting appellants' claim that the District Court should have made a finding as to the assets of the District and their relation to its liabilities before the conclusion could be properly drawn that the District was unable to meet its debts as they mature, this Court said that the situation was similar to the one under consideration in *Newhouse v. Corcoran Irrigation District,* supra, and quoted the foregoing part of the Court's opinion in the *Newhouse* case.

In an ordinary bankruptcy proceeding the object is to apply the debtor's assets as completely as possible to satisfy his debts. To further the accomplishment

of this objective, the law with respect to these proceedings expressly provides for the appointment of a trustee by the Court who succeeds to the title to all the debtor's property for the benefit of the creditors. As the successor to the title of all the debtor's property, he is empowered by law to bring all the necessary actions to preserve and protect the property for the benefit of the creditors.

A municipal composition proceeding, however, while maintainable under the bankruptcy powers, is a proceeding for voluntary settlement of its indebtedness and not a proceeding to adjudge the district a bankrupt, and although the jurisdiction of the Court over the municipal agency and its debt funds for the purpose of effectuating the composition is exclusive, that jurisdiction does not and cannot extend to adjudging the municipal agency bankrupt or to administering its affairs as in bankruptcy. See *Leco Properties v. R. E. Crummer & Co.,* 128 Fed. (2d) 110, 112, 113.

Despite the Court's clear and explicit rulings adverse to him in the *Newhouse* and *Lorber* cases, appellant's application for authority to institute suit against the appellees in this case demonstrates that he has not yet been able to divorce himself from the view that the foregoing principles of law in an ordinary bankruptcy proceeding apply to composition proceedings under the Municipal Bankruptcy Act.

As a result of the Supreme Court's decision in *Ashton v. Cameron County Water Improvement District,* 298 U.S. 513, 80 L.Ed. 1309, 52 Sup. Ct. 892,

Congress expressly drafted Sections 81-84 of the present act so that they did not impinge upon the sovereignty of the State or its political subdivisions. Only voluntary petitions are permitted under the law. Furthermore, the District Court's jurisdiction is limited to confirming or disapproving plans proposed by the debtor. The Court has no power to modify or alter the plan without the debtor's consent and has no jurisdiction to consummate them. The plans remain nugatory until the district elects to perform its part under the confirmed plan. *Leco Properties v. R. E. Crummer & Co.,* 128 Fed. (2d) 110. Subsection (i) of Section 73 of the earlier Act which conferred jurisdiction upon the Court upon the filing of the petition for composition to proceed and fixed the rights and duties of the district and creditors "the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered" was omitted from the 1937 Act. Under the new sections, even the power of reference is expressly limited to having findings made on special issues.

Provision is made in the Act for the appearance of individual creditors, committees, and agents and attorneys for such creditors and committees. Section 83 (a) provides:

> "For all purposes of this chapter any creditor may act in person or by an attorney or a duly authorized agent or committee. Where any committee, organization, group, or individual shall assume to act for or on behalf of creditors, such committee, organization, group, or individual shall first file with the court in which the proceeding is

pending a list of the creditors represented by such committee, organization, group, or individual, giving the name and address of each such creditor, together with a statement of the amount, class and character of the security held by him, and attach thereto copies of the instrument or instruments in writing signed by the owners of the bonds showing their authority, and shall file with the list a copy of the contract or agreement entered into between such committee, organization, group, or individual and the creditors represented by it or them, which contract shall disclose all compensation to be received, directly or indirectly, by such committee, organization, group, or individual, which agreed compensation shall be subject to modification and approval by the court."

Section 83 (b) provides:

"The court may allow reasonable compensation for the services performed by such referee in bankruptcy or special master, and the actual and necessary expenses incurred in connection with the proceeding, including compensation for services rendered and expenses incurred in obtaining the deposit of securities and the preparation of the plan, whether such work may have been done by the petitioner or by committees or other representatives of creditors, and may allow reasonable compensation for the attorneys or agents of any of the foregoing."

In addition to this, the Court is authorized under Section 83 (f) to direct the deposit of "money, securities or other consideration to be delivered to the

creditors under the terms of the plan" to "such disbursing agent as the court may appoint."

Nowhere in these precisely set out provisions for the exercise of the composition jurisdiction is provision made for the appointment or compensation of a trustee to succeed to the district's properties or any of its rights and duties. Such a provision would be repugnant to the fundamental premise of the composition sections that the district's independence is to be observed at all times.

The Court's authority to appoint depositaries and to recognize agents and attorneys of individuals or groups of creditors is set out above. Acceptance or confirmation of the position of such an agent by the Court, whether denominated agent or trustee, however, cannot invest the agent with control or authority over the debtor's affairs or its property. As agent for the creditors under the Plan charged with the duty of distributing funds delivered to him by redeeming landowners and funds and property delivered to him by the District under the Plan, it is understandable that provision was made for the agent to apply for instructions from the Court. Similarly, provision was made for the District to apply for instructions concerning its rights and duties under the Plan. (R. 58.) The agent's right to instructions, however, as his authority, could extend only to matters concerning distribution of the funds and property which had been delivered to him under the Plan and not to questions of property rights of the debtor. Such a construction of Paragraphs 20 and 27 is the only one compatible

with the validity of the plan of composition. The rights which appellant claims under this paragraph cannot be recognized without applying the principles of ordinary bankruptcy proceedings to composition proceedings advanced by him in *Newhouse v. Corcoran Irr. Dist.,* supra, and *Lorber v. Vista Irr. Dist.,* supra, but so clearly rejected by this Court.

That Paragraphs 20 and 27 of the Interlocutory Decree were not intended to be construed as vesting appellant with authority in connection with the District's property is shown by Paragraph 16 of the Interlocutory Decree which provides:

> "16. *That each and all of the creditors of the Petitioner* holding any security or securities affected by said Plan of Composition is adopted, including all of said bonds, all of said coupons, all of said warrants whether registered or not and all of said judgments, *and the agents, servants, attorneys and employees of said creditors,* or any of them, and their successors and assigns *are hereby restrained and enjoined, from in anywise enforcing or attempting to enforce any of said bonds,* coupons, warrants, and judgments or any rights in connection therewith in any manner inconsistent with or contrary to the terms or provisions of said Plan of Composition or other than as in said Plan of Composition provided, *and they and* each of them be and hereby *are enjoined,* pending the entry of the final decree herein, *from attempting the enforcement of any claim* or lien by legal proceedings or otherwise which they may have against Petitioner or *against any and all of the land situated within the boundaries of the*

District (Petitioner) and/or all land, if any, which was ever within said District." (R. 56.) (Italics ours.)

The purpose and validity of such a provision of the decree is discussed and sustained by this Court in *Nolander v. Butte Valley Irr. District,* 132 Fed. (2d) 704, 705. The provisions of this paragraph as effectively enjoin appellant, the bondholders' agent, from instituting a suit against appellees' land as it does the individual creditors, consenting or non-consenting. To permit appellant to prevail in the present application would be to condone a clear evasion of this express prohibition.

II.

APPELLANT'S APPLICATION FOR INSTRUCTIONS WAS ADDRESSED TO THE DISCRETION OF THE COURT AND THE ORDER THEREON IS NOT APPEALABLE BY HIM.

If it be assumed that appellant's authority extended to questions concerning the debtor's property and that he had the right to petition for instructions from the Court on such matters, the Court's order entered on such application is not appealable by him. Petitions for instructions in bankruptcy proceedings are addressed to the discretion of the Court. Its decisions on such matters are in main administrative rather than judicial decisions. See *Burco, Inc. v. Whitworth,* 81 Fed. (2d) 721, 728.

If appellant possessed the authority which he now claims, he had the right to exercise his independent

judgment as to the course to be pursued. Having elected, however, to submit the matter to the Court for its advice, he is now in no position to take an appeal from the advice so solicited. No reported case has been found where the trustee has been permitted to take an appeal from the Court's order upon his application for instructions. Decision of this question was expressly reserved by this Court in the case of *In re Western Pacific R. Co.,* 122 Fed. (2d) 807.

In cases where the Court has instructed the trustee upon his application to take some action, parties who would be adversely affected by the trustee's action have been permitted to appeal from the order. *In re J. Rosen & Sons,* 130 Fed. (2d) 81, 84; and see *Board of Road Commissioners of Monroe County, Michigan v. Keil,* 259 Fed. 76, where the appeal was dismissed because not from a final order but a petition to revise under the existing rules was granted. These cases are not authority for extending the right of appeal to the trustee who has invited the ruling of the Court by the presentation of his application for instructions. It is respectfully submitted that if the trustee declines to rely upon his own judgment and submits the proposal to the Court for its instructions, no reason exists why the trustee should not be bound by this election. If the trustee's desired course of conduct is so little supported in his own judgment that he cannot proceed without the approbation of the Court, the Court's disapproval hardly provides the basis for permitting him to appeal from the order as a matter of right.

III.

THE DENIAL OF THE APPELLANT'S REQUEST WAS PROPER AND WITHIN THE DISCRETION OF THE COURT.

A. The status of these lands had been determined by the Pueblo case.

Mr. Cook had been before the District Court a short time before on the same question that was raised by his application for instructions. Pueblo Trading Co. was the plaintiff in the previous action and the District was the named party defendant. In the course of the action the plaintiff, represented by Mr. Cook, sought an order directing the assessment of the lands owned by H. J. Clark, Lurley Clark, Lenora M. Bailey, Lyal Zeitler, George McRorey, Rachel McRorey, Lyman Dermott Stiles, James M. Farrell and Amy L. Farrell. These parties intervened pursuant to order of Court and opposed the assessment of the land on the ground that it was outside the District. (R. 94-96.) The Court decided the matter in favor of the landowners, filing a written opinion which is reported in 61 Fed. Supp. 586. The Court's holding in that case was as follows:

> "It is therefore held that the lands of the aforesaid petitioners herein, and each of them are not located within the boundaries of the Baxter Creek Irrigation District, defendant in the above entitled action, are not subject to the indebtedness of said defendant, and are not liable or subject to assessment by said defendant, the Board of Supervisors of Lassen County, California, the Assessor, Tax Collector, Treasurer, or any other officer of said County, or any of them, to pay the judgment rendered in the above en-

titled action; * * *'' (61 Fed. Supp. 586, at page 590.)

That part of Schedule B attached to the Plan of Composition which related to these lands expressly provided:

> "If U. S. District Court rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B' ". (R. 84.)

This provision also appears in Exhibit C attached to the Petition for Confirmation of the Plan. (R. 14.)

That the decision in the *Pueblo* case satisfied this provision was recognized by the District Court in the bankruptcy proceedings. Paragraph XIX of the findings of fact (R. 37-38), Paragraph XV of the conclusions of law (R. 46-47) and Paragraph 14 of the interlocutory decree (R. 55-56) relating to the levy of an additional assessment to pay the expenses of the plan of composition provide that the assessment is to be "levied against the amount listed in the column labeled 'Amount' in (Exhibit) Schedule 'B' of the Plan of Composition *for each of the tracts (plats) of land subject to assessment for the indebtedness of the District which are listed on pages 1 to 9 inclusive in (Exhibit) Schedule 'B' to the Plan now on file herein.*"

This provision is the sole reference in the Findings, Conclusions of Law and Interlocutory Decree relating to the land subject to assessment for the indebtedness of the District. The lands of appellees are excluded

under these provisions from the lands subject to assessment for the indebtedness of the District as they are not included in the lands listed on pages 1 to 9 of Schedule "B" but appear at the conclusion of this list on pages 10 and 11.

The Court's finding in this regard is supported by Exhibit 29 introduced into evidence at the hearing preliminary to the entry of the Interlocutory Decree. This exhibit sets forth that "Tracts 1, 2, 17, 21 23 & 6 (the lands of appellees herein) were held not to be in said District by the United States District Court, Northern District of California, Northern Division in Pueblo Trading Co. v. Baxter Creek Irrigation District, No. 4195 L, so should be disregarded and not taken into consideration pursuant to the Plan. (See 61 Fed. Supp. 586.) Tract 13, was also held not to be within said District pursuant to Stipulation and Order dated October 9, 1945, in Pueblo Trading Co. Case 4195 L." (R. 99.)

The Court's finding in this regard is further supported by Exhibit 15 introduced into evidence at the same hearing. This exhibit is a map of the lands within the District and excludes the lands of these appellees from the boundaries of the District. (This is one of the original exhibits transmitted to the Circuit Court of Appeals.)

Appellant bases a considerable part of his argument on the fact that he objected to the introduction of the judgment in the *Pueblo Trading Co.* case into evidence and that this exhibit was subsequently withdrawn from evidence. This is relied upon by appellant to

support his contention that the parties never intended the judgment in the *Pueblo* case to be determinative of the liability of appellees' lands to the Plan of Composition but that it was to be determined by subsequent proceedings in the Bankruptcy Court.

Appellant's claim in this regard is unsupportable. The provision in the Plan of Composition is that appellees' lands are not to be considered as part of Exhibit "B" if "U. S. District Court" rules they are not within the Baxter Creek Irrigation District. (R. 84.) The *Pueblo* case was pending in the U. S. District Court at the time of the preparation and filing of the Plan of Composition. The Schedule by its terms refers to a decision by the U. S. District Court and is not limited to a decision in the bankruptcy proceedings. The decision in the *Pueblo* case as to these lands was one made by the U. S. District Court and evidence of this decision was introduced in the bankruptcy proceedings. The introduction of the judgment in the *Pueblo* case was rendered unnecessary by the introduction of the foregoing Exhibits 29 and 15 which set forth sufficient information to support the Court's finding in this regard.

The withdrawal from evidence of the formal orders in the *Pueblo* case was made as appears from the record of the proceedings at that time "because of some possible question of appeal from those orders." (R. 109.) Irrespective of any question of appeal at that time, no steps to perfect an appeal were taken in the time intervening between the hearing on the plan and the entry of the findings, conclusions of law and

interlocutory decree. It is submitted that there was sufficient evidence in the record at that time to support the Court's findings and conclusions relating to the land subject to assessment and the provisions of the interlocutory decree hereinabove referred to. No attack has ever been made on these provisions and they are now binding as to all parties. *Glenn-Colusa Irr. Dist. v. Mason,* 143 Fed. (2d) 564.

B. A finding of res judicata is not necessary to sustain the lower Court's order.

Appellant claims that the *Pueblo* case is not *res judicata* of the liability of appellees' lands to the Plan of Composition and that therefore the lower Court's ruling on his application for instructions is erroneous as a matter of law. The application for instructions was one addressed to the Court's discretion and will be reversed only for an abuse of discretion. The lower Court pointed out that the very question under consideration had been fully and completely heard just a short time earlier before the same judge that was sitting in the composition proceedings. A written opinion on the merits had been filed and reported. This opinion was read and studied by the lower Court as appears from its opinion. (R. 94.)

A finding of *res judicata* is not necessary to uphold the lower Court's ruling that appellant should not institute suit to relitigate the liability of appellees' lands to the plan of composition. See *Board of Road Comm'rs etc. v. Keil,* supra, and *In re J. Rosen & Sons,* supra. If it be assumed, therefore, that techni-

cally Judge Welsh's decision was not *res judicata* of the matter, the circumstances of the situation considered by the Court were more than sufficient to establish that the ruling was proper and not an abuse of discretion.

C. The Pueblo case is res judicata as to the status of appellees' land.

It is submitted, however, that not only is the lower Court's ruling on the application for instructions supportable as a proper exercise of his discretion under the circumstances but that the decision on the matter in the *Pueblo* case would be *res judicata* in another proceeding whether it be brought by Mr. Cook, as agent or trustee for the creditors, or by the District. Mr. Cook's claim that the *Pueblo* case is not *res judicata* as to the matter is predicated on the fact that all the creditors were not a party plaintiff to the *Pueblo* proceeding.

As required by Sections 83 (a) and (b) of the Act, the Bondholders Protective Committee filed in the composition proceedings its statement of expenses incident to the plan of composition and its representation of the creditors and sought approval of these expenditures by the Court. Paragraph 5 of the Statement of Expenses provides:

> "5. Legal services due and payable to W. Coburn Cook, Berg Building, Turlock, California, in special proceedings on behalf of and for the benefit of the bondholders protective committee, including services in a representative capacity in the case of Pueblo Trading Co. v. Tule Irrigation

> District and Pueblo Trading Co. v. Baxter Creek Irrigation District, Proceedings in relation to the assessment of lands in the Tule Irrigation District and Baxter Creek Irrigation District and pertaining to the expulsion of land and reference thereto.....$3,500.00". (R. 21.)

Paragraph XVII of the Court's findings of fact approves these expenses and provides:

> "That the statement of expenses filed by the Bondholders Protective Committee is fair and reasonable; that the services of W. Coburn Cook in the Pueblo Trading Co. v. Baxter Creek Irrigation District, No. 4195 L, were performed in a representative capacity for *all* creditors of said District." (Italics ours.) (R. 36.)

Mr. Cook was very happy to have this finding entered in connection with the approval of the payment of his legal fees that his services in the *Pueblo* case were performed in a representative capacity for all creditors of the District. Now that this finding as to his fees has become final and unappealable Mr. Cook baldly disclaims any action in a representative capacity for all creditors of the District. Neither Mr. Cook nor any of the creditors saw fit to challenge this finding of the Court and should not be heard to complain now that such action was not representative of all of the creditors.

It is not essential to a holding of *res judicata,* however, that a finding be made that Mr. Cook's action in the *Pueblo* case was in a representative capacity for all the creditors. As Judge Foley pointed out in

his opinion, the District was a party to the *Pueblo* case and the adjudication in that action is binding on the District "and any person asserting rights through, or as successors in interest to, or by virtue of the irrigation district." (R. 95.) In this case, whether Mr. Cook be regarded as vested with all the rights of a regular trustee in bankruptcy or merely as an agent for all the creditors, his rights are derivative. It is well settled that a judgment against the debtor is binding on the trustee in bankruptcy as his rights are derived from the bankrupt. *Detroit Trust Co. v. Schantz,* 14 Fed. (2d) 225, aff'd 16 Fed. (2d) 943. Similarly, as agent for all the creditors, Mr. Cook's right to litigate the status of appellees' lands is foreclosed by the ruling in their favor in the *Pueblo* case to which the District was a party. The officers of the District represent all the creditors of the District, including the bondholders, in such proceedings. *Kersh Lakes Drainage Dist. v. Johnson,* 309 U.S. 485, 60 Sup. Ct. 640, 84 L. Ed. 881; *Bloomfield Village Drain. Dist. v. Keefe,* 119 Fed. (2d) 157, 165, 166. In the *Kersh* case, as here, the question in the first proceeding was the taxpayer's liability for an assessment which had been levied against his land. The Court ruled in the landowner's favor and in a later suit brought by a creditor to enforce collection af the assessment, the Supreme Court held that the District in the first proceeding represented all the creditors and bondholders and that they were foreclosed by the first decree in the landowner's favor. These decisions are controlling here.

Appellant claims that the Court's decision below was in error because there was no formal plea of *res judicata* and the judgment in the *Pueblo Trading Co.* case was not introduced in evidence. It is said that without these steps, there could be no finding of *res judicata* in this action. Appellant misconceives appellees' position. Appellees have never contended that the *Pueblo* case decision foreclosed the Court's consideration of appellant's application for instruction but that the *Pueblo* decision would be *res judicata* in another proceeding seeking to establish that the land was subject to assessment by the District and that for this reason the application for instructions should be denied. Mr. Cook's argument that the lower Court had no right to consider Judge Welsh's decision in the *Pueblo* case on the identical issue presented by his application for instructions because it was not formally pleaded and proved, bespeaks poorly of his good faith in filing the application. Having solicited the advice and counsel of the Court on the matter, the obligation was on Mr. Cook, if anyone, to see that the Court was fully advised as to all the pertinent facts. In good conscience and the performance of his duty as a self-professed officer of the Court, the facts concerning the past litigation of this same issue should have been fully pleaded by Mr. Cook in his application for instructions. He should not now be heard to argue that the wisdom of the Court's judgment on his application should be weighed on the basis of the success or failure of his concealment of the facts.

IV.

APPELLANT HAS BEEN GUILTY OF LACHES.

If appellant was possessed of the authority which he claims, his application to the Court on October 27, 1946, was barred by laches. The last of the orders in the *Pueblo* case was entered October 9, 1945. (R. 108.) Notice of entry of the orders was filed October 25, 1945. (R. 108.)

The Interlocutory Decree was filed January 3, 1946. (R. 50.) The times for appeal from all of these orders have long past run. The landowners whose lands were subject of appellant's claim relied on the finality of these orders. The property of Lyman Demott Stiles was sold to Mr. and Mrs. Blickenstaff, appellees herein (R. 94), and the property of the Farrells was sold to Harry and Minnie Reuck (see affidavit of counsel filed herein on August 21, 1947). No justification for the appellant's delay in this matter has been offered. It would be patently unfair and unjust to make these owners now defend another action to test their titles. These intervening rights which have become vested upon the faith of the prior decrees should be given consideration by the Court. See *Bekins v. Compton-Delevan Irr. Dist.,* 150 Fed. (2d) 526, 530.

V.

THE LANDOWNERS WHO APPEAR AS APPELLEES HEREIN HAVE A REAL AND SUBSTANTIAL INTEREST IN THE MATTER AND ARE PROPER PARTIES TO THE APPEAL.

No question has been raised by appellant in his opening brief concerning the landowners' right to appear in this proceeding. At the time of the hearing before the lower Court, however, appellant strenuously objected that the landowners were not proper parties before the Court and that they should not be heard in opposition to his application. Appellant's objection was disregarded by the District Court and appellees were heard in opposition to the application just as they were permitted to intervene and oppose Mr. Cook's previous application in the *Pueblo* case seeking to subject the lands to assessment for the District's indebtedness.

The plan of composition is "in its essence a contract, proposed by the debtor and agreed to by those of the creditors who give consent, and they in the requisite majority bind all. *American United Life Ins. Co. v. Haines City, Fla.,* 117 Fed. (2d) 574. The landowners who are appellees herein were certainly third party beneficiaries of the provision of the plan that the status of this land should be determined in the "U. S. District Court" and that if it "rules the following lands are not within the Baxter Creek Irrigation District they will not be considered as part of Exhibit 'B'." (R. 84.)

Apart from this fact, however, the right of persons who would be adversely affected by the granting of the instructions to appear and be heard on the matter

has been recognized in many cases. *In re J. Rosen & Sons,* 130 Fed. (2d) 81, 84; *Burco v. Whitworth,* 81 Fed. (2d) 721, 728-729; *Penn. Cement Co. v. Bradley Const. Co.,* 274 Fed. 1003; *Bd. of Road Commissioners of Monroe County, Mch. v. Keil,* 259 Fed. 76. The *Rosen, Burco* and *Keil* cases were appellate decisions and in each case the appeal was taken by the party adversely affected by the order entered on the trustee's application for instructions. If the party adversely affected has the right to take an appeal, it is clear that the corresponding right to appear in opposition to the appeal should be extended to him.

CONCLUSION.

Appellant's summary disposition of this matter in his opening brief does not reflect its importance to the landowners herein. As an experienced promotor and perennial litigant in California irrigation and reclamation district cases, the institution of another suit or the taking of another appeal means little to appellant except the possibility of a greater fee. To these landowners, however, their land is not only their present livelihood but represents the culmination of a lifetime of hard work. The prospect of loss of this land is a vital matter to them. They have had to face that prospect once already in the *Pueblo* case.

Appellant's claim was completely and finally disposed of by Judge Welsh's decision in the *Pueblo* case. The right of appeal was open to appellant if he conscientiously felt the Court had erred. This right, however, he did not see fit to exercise. Now

appellant seeks authority to institute a second vexatious suit to relitigate the same matter. He has not advanced any basis such as newly discovered evidence or changes in the applicable law to support the present application. In fact, it is his contention that the Court should close its eyes to the fact of the prior litigation. The only basis for the present application is appellant's desire to have another try at it in another forum.

Appellees earnestly believe that the instructions sought by appellant transgress his authority and are predicated on the false premise that he has the rights and duties of a trustee in an ordinary bankruptcy proceeding. Further, it is believed that appellant has no right to appeal from the instructions which were given by Judge Foley in response to his application. On the merits, however, it is submitted that the instructions were not only proper and within the Court's discretion but that they were the only instructions that could have been given under the circumstances. The order appealed from should therefore be affirmed.

Dated, San Francisco,
September 24, 1947.

Respectfully submitted,
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